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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. MISSION SUPPORT ALLIANCE, LLC, LOCKHEED MARTIN SERVICES, INC., LOCKHEED MARTIN CORPORATION, and JORGE FRANCISCO "FRANK" ARMIJO, Defendants.	Hon. Rosanna Malouf Peterson No. 4:19-cv-05021-RMP MISSION SUPPORT ALLIANCE, LLC'S MOTION TO DISMISS THE COMPLAINT Hearing Date: October 3, 2019 Hearing Time: 10:00 a.m. WITH ORAL ARGUMENT

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INTRODUCTION

The government's Complaint is a textbook case of overreach: a retroactive attempt by the Department of Justice to impose False Claims Act liability on a government contractor for actions performed with contemporaneous agency knowledge and approval. Mission Support Alliance, LLC ("MSA") bid on, was awarded, and has performed the Mission Support Contract ("MSC") at the United States Department of Energy ("DOE") Hanford site for a decade. Lockheed Martin Services, Inc. ("LMSI"), MSA's information technology subcontractor from 2010-2016, had performed the same scope of work (*before* MSA was awarded the MSC) going back to the 1990s. Each pertinent aspect of MSA's subcontract with LMSI was disclosed to, discussed with, and approved by DOE. There is no allegation that any of the services rendered by MSA or LMSI were in any way deficient, or that MSA charged DOE anything other than prices listed in the subcontract that DOE approved. This case is a classic example of what is, at most, a contract dispute transformed ten years later into allegations of fraud by hindsight.

At bottom, the government complains that DOE was misled into believing that LMSI would not earn any profit under its subcontract with MSA, and that the rates charged by LMSI to MSA were fraudulently inflated. *See, e.g.*, Compl. ¶¶ 2, 73, 103-10. But the Complaint fails to plead scienter or materiality with sufficiently plausible factual support to state a valid False Claims Act claim. The absence of allegations essential to these two elements is striking.

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For example, the Complaint alleges repeatedly that LMSI was not allowed to earn any profit on its subcontract because it was an affiliate of MSA, which was part-owned by Lockheed Martin. Compl. ¶¶ 37, 114. But the Complaint acknowledges that profit (or so-called affiliate fee) is allowed where the services provided by the contractor are "commercial" in character. *See id.* ¶ 37; *see also* 48 C.F.R. § 31.205-26(e), § 15.403-1(b). To plead materiality and scienter, the Complaint therefore must allege particularized facts showing that the services provided by LMSI were not commercial, and that MSA knew they were not commercial. Without those allegations, the FCA theory fails. Yet nowhere does the Complaint allege which or how many services provided by LMSI to DOE were not commercial; that DOE told MSA or LMSI that the services would not be considered commercial (and thus ineligible for profit on that basis); or that MSA or LMSI represented the services would not be commercial. On the contrary, the Complaint affirmatively alleges that MSA consistently insisted that the services *were* commercial. *See, e.g.*, Compl. ¶¶ 64, 75, 111. That dooms the government's theory.

Moreover, the Complaint alleges that LMSI should not have included any profit potential in the rates for its subcontract with MSA. *E.g.*, Compl. ¶¶ 62, 83-84, 86. But nowhere does DOJ allege that the parties entered into, or should have entered into, a cost-reimbursable contract—the type of contract vehicle used when profit is *not* permitted under the affiliate fee regulation and services must instead be sold "on the basis of cost incurred." *See* 48 C.F.R.

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§ 31.205-26(e). On the contrary, the Complaint makes clear that DOE knowingly approved a subcontract comprised of three contract types—time and materials, fixed price, and fixed unit rate—that, by their very nature, are not cost-reimbursable and allow a subcontractor to earn a profit (or sustain a loss). It is simply not possible as a matter of law for the government to establish scienter or materiality under the False Claims Act (or indeed to prove that a false claim was submitted) on the basis that a contractor earned a profit on a contract structured this way and knowingly approved by the agency.

In an ordinary case, the government's concerns about the appropriateness of costs billed would be resolved as a contract dispute before a Civilian Board of Contract Appeals ("CBCA")—an expert forum granted jurisdiction over contract disputes. Indeed, DOE's contracting officer triggered the contract disputes process regarding this very contract and these same payments in 2015, when he issued a notice of intent to disallow any costs resulting from profit earned by LMSI; that matter has been pending before the CBCA since 2015 and is now stayed. But the government decided not to abide by the procedure that Congress specified and the DOE contracting officer initiated. Instead, the Department of Justice embarked on a wide-ranging investigation culminating in this False Claims Act suit that, effectively, dresses up a contract dispute over the commerciality exception to the affiliate fee rule as a False Claims Act case.

That effort fails at the pleading stage, and dismissal is warranted under Federal Rules of Civil Procedure 8, 9(b), 12(b)(1), and 12(b)(6). The Complaint

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fails adequately to plead scienter and materiality essential to the False Claims Act claims, and this Court lacks jurisdiction to hear the breach of contract claim under the Contract Disputes Act.[1]

BACKGROUND

MSA is a joint venture that, during the time period relevant to the Complaint, was owned by Lockheed Martin Integrated Technology, a wholly owned subsidiary of LMC; Wackenhut Services, Inc.; and Jacobs Engineering Group, Inc. Compl. ¶ 8. MSA was created for the purpose of bidding on and performing DOE's mission support prime contract at the Hanford nuclear site. *Id.* Under the Mission Support Contract, MSA provides support "essential to the success of the Hanford Site cleanup mission from an operational, safety, and security standpoint." *Id.* ¶ 35. Part of MSA's role is to supply "DOE and its contractors with cost-effective infrastructure and site services integral and necessary to accomplish the Hanford Site environmental cleanup mission,"

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[1] For purposes of judicial economy, MSA joins in the arguments advanced by Lockheed Martin Corporation, Lockheed Martin Services, Inc., and Frank Armijo about the Anti-Kickback Act, *see* LMC Mot., at Section III.B, Armijo Mot., at Section I, which apply equally to MSA. MSA also joins the other relevant portions of the defendants' briefs, which further explain why the government's False Claims Act claims warrant dismissal.

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including "Information Resources/Content Management." *Id.* This work scope involves a range of common information services and technology, including Local Area Network (LAN), desktop and user services, telecommunications systems, radios, and pager systems. The goal of these services is to provide the necessary technical support to allow the "thousands of workers involved in the cleanup efforts" to focus on and successfully execute their environmental cleanup mission. *Id.* ¶ 34.

The Complaint's allegations focus on a subcontract MSA entered into with LMSI, an LMC subsidiary, to perform the information resources/content management ("IR/CM") scope of work required by the Mission Support Contract. Compl. ¶¶ 43, 45, 52. LMSI for nearly a decade had performed the "same services" under a prior subcontract in which Fluor, not MSA, was the prime contractor, *id.* ¶ 113, and MSA identified LMSI as its proposed continuing subcontractor for these services from the outset of the bidding process, *id.* ¶ 43. After a lengthy series of negotiations and discussions that the Complaint selectively describes, DOE conditionally consented to the LMSI subcontract on February 1, 2011, provided that LMSI further reduce its rates, which it did. *Id.* ¶¶ 114-16.

Nearly four years later, on May 18, 2015, DOE notified MSA that it would seek to disallow certain payments made to LMSI under the subcontract. This process culminated in a decision by a contracting officer issued on November 10, 2015, finding that a portion of the revenue collected by LMSI

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was unallowable affiliate profit under the Mission Support Contract and various provisions of the Federal Acquisition Regulation because the services were not commercial. MSA appealed the decision of the contracting officer to the CBCA, CBCA No. 5095. The appeal of that contract dispute was stayed during the pendency of the DOJ's three-year investigation, and remains stayed following the filing of this action to allow for the resolution of the False Claims Act claims over which the CBCA has no subject matter jurisdiction. *See* Ex. A (order granting stay).

In the Complaint, the government asserts claims under the False Claims Act, alleging that LMSI and MSA defrauded the Department of Energy by enabling LMSI to earn a profit on the subcontract, and by charging inflated rates. Compl. ¶¶ 2, 73, 103-10, 132-41. The government also contends that MSA violated the AKA by soliciting and accepting kickbacks to MSA personnel. *See id.* ¶¶ 142-46. Finally, in addition to other common law claims not brought against MSA, the government alleges a breach of contract action against MSA. *Id.* ¶¶ 147-48.

ARGUMENT

I. The Government's False Claims Act Claims Should Be Dismissed For Failure To Plead Scienter And Materiality (Counts I & II).

The government's False Claims Act claims should be dismissed at the outset under Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6) because the Complaint does not adequately plead facts to establish MSA's scienter or the

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materiality of any alleged misstatement to DOE's decisions to pay for the IT services MSA provided through the subcontract.

The Supreme Court has called for "rigorous" application of the False Claims Act's materiality and scienter requirements, both of which must be "strictly enforced," including at the motion to dismiss stage. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016); *see also United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1270 (D.C. Cir. 2010) (observing need for "strict enforcement of the Act's materiality and scienter requirements"). A contractor does not act with scienter if that contractor knows the government is aware of and has acquiesced in a particular payment practice. *See Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1116 (9th Cir. 2014).

"The materiality standard is demanding," and government payment of "a particular claim in full despite its actual knowledge that certain requirements were violated" is "very strong evidence that those requirements are not material." *Escobar*, 136 S. Ct. at 2003. Similarly, regular government payment of "a particular type of claim in full despite actual knowledge that certain requirements were violated" is "strong evidence that the requirements are not material." *Id.* at 2003-04; *see also United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 333-36 (9th Cir. 2017) (materiality not met where government continued to pay defendant's claims despite noncompliance). In *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 F. App'x 535, 537 (9th Cir. 2018), the

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Ninth Circuit applied *Escobar* to foreclose FCA liability where the government paid claims for years despite knowledge of relators' allegations and the results of the government's audit that disclosed key features of the purported fraud. *Honeywell* further held that "the government's knowledge also negates scienter" based on the same evidence. *Id.* at 539.

These legal principles are controlling and require dismissal here.

a. The first premise of the government's case is that LMSI and MSA allegedly violated the False Claims Act by allowing LMSI to earn a profit on its subcontract. According to the government, this type of "affiliate fee" is precluded both by the applicable contract and by the Federal Acquisition Regulation ("FAR"). *E.g.*, Compl. ¶¶ 1-3, 37, 125. But both the applicable contract and the FAR recognize an exception to this rule where the contractor is providing "commercial" services, which are defined as any type of item "customarily used by the general public or by non-governmental entities for purposes other than governmental purposes" and that have been "sold, leased, or licensed to the general public" or "offered for sale, lease, or license to the general public." 48 C.F.R. § 2.101; *see* Compl. ¶ 37; 48 C.F.R. §§ 31.205-26(e), 15.403-1(b). That definition squarely applies to the IT services LMSI was providing at the Hanford site, both for the Department of Energy and for many private sector companies. *See* Compl. ¶ 111.

The Complaint is conspicuously vague about the commercial services exception to the affiliate fee rule. It does not allege which or how many services

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it claims were not commercial. *See, e.g.*, Compl. ¶¶ 64, 75. It does not allege that MSA or LMSI represented the services would not be commercial. Indeed, the Complaint acknowledges that MSA consistently adhered to the position that the services provided by LMSI *were* commercial. *See, e.g.*, *id.* ¶¶ 64, 75, 111. The Complaint does not allege that DOE ever communicated to LMSI or MSA a final determination that the services would not be considered commercial and were ineligible for profit on that basis. Nor is there any allegation that DOE ever told MSA or LMSI that the subcontract must be a cost-reimbursable type contract, which would be necessary if all profit were disallowed. *See, e.g.*, *id.* ¶ 114; *see also* 48 C.F.R. § 31.205-26(e) (absent the services being commercial in nature, the subcontract "shall be [billed] on the basis of cost incurred").

To the contrary, the government acknowledges that the rates proposed and charged through the LMSI subcontract that DOE approved used a "variety of fixed unit rates, firm fixed price and time and materials services." *See* Compl. ¶ 53. That is significant, because those contract mechanisms inherently provide the potential for a contractor to make a profit (or sustain a loss), and the Federal Acquisition Regulation governing agency procurement decisions expresses a preference for these mechanisms because they frequently aid the government by aligning the contractor's incentives appropriately. For example, in selecting a contract type, "[t]he objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical

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performance." 48 C.F.R. § 16.103(a). For this reason, the FAR states that fixed-price contracts should be used where possible precisely because they leverage "the basic profit motive of business enterprise" to "appropriately tie profit to contractor performance." *Id.* § 16.103(b). A firm-fixed-price contract, for instance, "provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract," and thus "places upon the contractor maximum risk and full responsibility *for all costs and resulting profit or loss*." *Id.* § 16.202-1 (emphasis added); *see id.* § 16.601(b) (stating that "time-and-materials contract provides for acquiring supplies or services on the basis of . . . labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit"); *see also* Vernon J. Edwards, *Firm-Fixed-Unit-Price vs. Time-And-Materials: A Good Alternative For Services Acquisition*, 29 Nash & Cibinic Rep. NL ¶ 18 (Apr. 2015) (observing that, for fixed unit rates, "[t]he unit price covers all costs and profit, not just labor, and the *contractor bears the risk associated with all performance cost*" (emphasis added)).

Here, there is no question that the DOE knew of and approved a subcontract that—through its "variety of fixed unit rates, firm fixed price and time and materials services," Compl. ¶ 53—inherently permitted the subcontractor the opportunity to earn profit. And it reimbursed MSA for invoices submitted by that subcontractor from 2010 through 2015. *See id.* ¶ 124.

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These pleading admissions are fatal to the scienter element. Indeed, where the government knows about the underlying purportedly fraudulent conduct, no False Claims Act liability can attach. *See Gonzalez*, 759 F.3d at 1116 ("Stated simply, even if bills sent by Planned Parenthood were false in portraying its costs, one cannot plausibly conclude that there was knowing falsity on the part of Planned Parenthood given the explicit statements addressing this subject made by the State of California through CDHS and the State's silence after being told what procedures Planned Parenthood was following."). Moreover, the standard for scienter is an objective one, and when a defendant discloses reliance on and follows a reasonable interpretation of the relevant contractual or statutory provisions—here, the commercial services exception to affiliate fee rules—it does not act with the requisite intent under the False Claims Act. *See id.* at 1115 (no scienter where government "expressed concern over Planned Parenthood's billing practices, but remained silent when Planned Parenthood explicitly described its billing practices and rationale"); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996); *cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007) (defendant did not act with recklessness for purposes of Fair Credit Reporting Act when following a "reasonable interpretation" of statutory and regulatory guidance). The Ninth Circuit has squarely held that "'differences in interpretations' [over regulatory and contractual requirements] are not sufficient for False Claims Act liability to attach." *United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166, 1174

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(9th Cir. 2006) (quoting *Anton*, 91 F.3d at 1267). That principle compels dismissal of this case.[2]

The Complaint also fails to plead materiality. *First*, a large number of the Complaint's materiality allegations can be set aside as conclusory statements. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This includes, for example, allegations that the Defendants made false records and statements "material to the Department of Energy," Compl. ¶ 1; that Defendants "misrepresented and omitted critical and material information" that "caused DOE to pay Defendants tens of millions of dollars of inflated claims and unallowable profit," *id.* ¶ 2; and that "MSA's letter requesting consent . . . contained numerous knowingly false statements that were material to DOE's evaluation of MSA and LMSI's request for consent to the subcontract," *id.* ¶ 103. These types of "conclusory

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[2] The Complaint relies heavily on the phrase "no affiliate fee will be allowed" in the conditional consent letter dated February 1, 2011, Compl. ¶ 114, but that letter did not say that the services were not commercial or that the subcontract must be changed to a cost-reimbursable type contract, and the Complaint itself describes a negotiation process and not statements of legal conclusions, *see id.* ¶ 116 ("rather than carry out DOE's wishes by removing the proposed profit, . . . [Defendants] agreed to reduce LMSI's proposed labor rates by 1 percent").

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allegations are insufficient to allege materiality under the False Claims Act" under the standard discussed in *Escobar* and Rule 9(b), which requires the government to "plead [its] claims with plausibility and particularity." *Escobar*, 136 S. Ct. at 2004 n.6; *see also, e.g.*, *United States v. Monaco Enterprises, Inc.*, No. 12-cv-0046, 2016 WL 3647872, at *4-5 (E.D. Wash. July 1, 2016) (similar).

Second, the government's knowledge at the time of facts that make up key features of the alleged "fraud"—which is discernible on the face of the Complaint—compels dismissal. The government's payment of "a particular claim in full despite its actual knowledge that certain requirements were violated" is "very strong evidence that those requirements were not material." *Serco*, 846 F.3d at 334 (quoting *Escobar*, 136 S. Ct. at 2003); *see also United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1019 (9th Cir. 2018) (same); *see also Honeywell*, 740 F. App'x at 538 ("Here, the Army began paying Honeywell's claims in 2003, and continued up to at least 2008, despite being aware of Relator's fraud allegations . . . .").

The recent decision in *United States ex rel. Ling v. City of Los Angeles* is instructive on the high bar recognized by the Supreme Court in *Escobar* and the Ninth Circuit cases applying it. No. 11-cv-974, 2018 WL 3814498, at *22 (C.D. Cal. July 25, 2018). The government alleged in *Ling* that the defendants made false representations to receive federal housing funds. *Id.* at *1. The district court concluded that dismissal was warranted even though the "government's complaint plausibly allege[d] that compliance with federal accessibility laws

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was a condition of payment, that it was denied the benefit of its bargain with Defendants, and that the alleged noncompliance was substantial." *Id.* at *22. Notwithstanding these conclusions "suggest[ing] materiality," the district court concluded that the complaint fell "short of countering the 'very strong evidence' of *immateriality* created by" the government's continued payment despite knowledge of alleged wrongdoing. *Id.* (emphasis added).

This case is on all fours with these precedents. Here, MSA and LMSI repeatedly insisted to DOE that the IT services provided by LMSI to the government (and to many other private companies) were "commercial" services under the FAR, *see, e.g.*, Compl. ¶¶ 64, 75, 111; DOE never clearly or formally determined that the services were not commercial, nor communicated that decision to MSA and LMSI; instead, DOE knowingly and readily approved a subcontract that *anyone* familiar with the FAR would recognize carried the potential for profit, *see, e.g.*, 48 C.F.R. § 16.202-1; *id.* § 16.601(b); 29 Nash & Cibinic Rep. NL ¶ 18; and DOE paid all claims after the subcontract approval for years, *see* Compl. ¶ 124. These facts cannot support the scienter and materiality necessary to state a valid False Claims Act case.

b. The Complaint's "escalation theory" of False Claims Act liability fares no better. In addition to its allegations about profit, the Complaint also alleges that MSA violated the FCA by enabling LMSI to charge undisclosed and unreasonably high rates. In particular, the government claims that MSA and LMSI misled DOE by applying an "escalation factor" to LMSI's published U.S.

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General Services Administration approved labor rates. Compl. ¶ 73. But even the Complaint's incomplete and selective allegations confirm the relationship between the rates in the published GSA 4863G schedule on the one hand, and the rates that MSA charged to the government on the other, at the time the subcontract was approved and at the time all of the MSA invoices were paid. The Complaint tries to manufacture a deception when there was none.

According to the Complaint, the government had all of the information that it now says reveals so-called improper "escalation" or "inflation." It had the GSA 4863G schedule, *e.g.*, Compl. ¶¶ 45, 66, 69, 73, which was not only published but had been approved by the federal government. It had the rates in the LMSI subcontract, and it knew the charges actually submitted by MSA in invoices. *E.g.*, *id.* ¶¶ 89-92 (describing October 2010 Best and Final Offer "LMSI prepared for MSA to submit to DOE" and contrasting particular labor rates in "LMSI's then-current published GSA rate" schedule with LMSI's "proposed" rates). Most importantly, the Complaint concedes that a straightforward comparison of the 4863G schedule to the rate schedule from LMSI "made clear" that the proposed rates in the subcontract were higher. *Id.* ¶ 72. For all of the excited rhetoric, these concessions in the Complaint are fatal to the False Act Claims theory. *E.g.*, *Serco*, 846 F.3d at 334 (holding that materiality standard was not met where government accepted "reports despite their non-compliance" with a regulatory provision and continued paying defendant's vouchers).

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The Complaint's apparent fallback that MSA or LMSI fraudulently misrepresented the *amount* of profit fails for all the same reasons. *See, e.g.*, Compl. ¶¶ 65, 68. The government approved a commercial subcontract that inherently carried profit potential, and all of the rates charged to the government were fully disclosed. Because the government never took the position that the LMSI subcontract had to be cost-reimbursable, or requested more discounting to the rates than LMSI provided, it cannot attack the amount of profit actually earned by LMSI as the supposed product of fraud.

The government's continued payment despite knowledge of the key facts of the alleged fraud—here, the standard rate escalation in LMSI's rates and profit potential inherent in the contract types—forecloses a finding that MSA intended to mislead or did materially mislead the DOE regarding potential profit in the LMSI subcontract.[3]

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[3] The same result follows for the Complaint's other undeveloped allegations regarding potential False Claims Act liability, which are discussed in greater detail in the other defendants' motions to dismiss. *See, e.g.*, LMC Mot., at Section III.C. MSA incorporates those arguments by reference.

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II. The Contract Disputes Act Divests This Court Of Jurisdiction Over The Government's Breach Of Contract Claim (Count IV).

The government's final claim against MSA incorporates all prior allegations in the Complaint and summarily concludes that those allegations also make out a claim for breach of MSA's Mission Support Contract. Compl. ¶¶ 147-48. This claim must be dismissed because the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et seq.*, divests the federal district courts of jurisdiction over breach of contract claims in these circumstances. *See* Fed. R. Civ. P. 12(b)(1).

"The CDA exclusively governs Government contracts and Government contract disputes." *Texas Health Choice, L.C. v. Office of Pers. Mgmt.*, 400 F.3d 895, 898 (Fed. Cir. 2005). The CDA's exclusive review scheme "applies to any express or implied contract . . . made by an executive agency for . . . the procurement of property . . . [or] the procurement of services." 41 U.S.C. § 7102(a)(1), (2). Under the CDA, government claims against a contractor like MSA "relating to" a contract must be decided by a contracting officer. *Id.* § 7103(a)(3). The contracting officer's decision "is not subject to review by any forum, tribunal, or Federal Government agency," unless authorized by the CDA. *Id.* § 7103(g). A contractor may appeal the contracting officer's decision to an agency board of contractor appeals (here, the CBCA) or, "in lieu of" appealing to an agency board, a contractor may bring an action in the United States Court of Federal Claims. *Id.* § 7104(a), (b)(1). CBCA decisions are appealable to the

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United States Court of Appeals for the Federal Circuit by either the contractor or the Government. *Id.* § 7107(a)(1)(A), (B).

The CDA's exclusive review scheme means that the breach of contract claim is not properly adjudicated here because "federal district courts lack jurisdiction over government claims against contractors which are subject to the CDA." *United States v. J & E Salvage Co.*, 55 F.3d 985, 987 (4th Cir. 1995); *see also United States v. Hughes Aircraft Co.*, No. 89-cv-6842, 1991 WL 133569, at *1 (C.D. Cal. Apr. 5, 1991); S. Rep. No. 1118, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5244 ("U.S. district court jurisdiction is eliminated from Government contract claims."). Because the government claims that MSA "materially breached its Mission Support Contract" with DOE, Compl. ¶ 148, the dispute plainly "relat[es] to" an express contract between DOE, an executive agency, and MSA, a contractor, for procurement of services, within the meaning of the CDA. 41 U.S.C. § 7102(a)(2). The CDA divests the district court of jurisdiction over the breach of contract claim, which must be adjudicated according to the procedures prescribed by the statute.

That analysis does not change merely because the Complaint also alleges claims under the False Claims Act. While FCA claims are not subject to the CDA's procedures, the CDA prescribes the exclusive avenue for the resolution of the breach of contract claim. Section 7103 of the Contract Disputes Act removes certain fraud claims from the CBCA's jurisdiction. *See* 41 U.S.C.

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§ 7103(c)(1) (the CDA "does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud"). This so-called "fraud exception does not apply if a claim can be decided under the CDA without a determination of fraud." *United States v. Marovic*, 69 F. Supp. 2d 1190, 1194 (N.D. Cal. 1999); *see, e.g.*, *United States ex rel. Perron v. Hughes Aircraft Co.*, No. 89-cv-3312, 1991 WL 352416, at *1 (C.D. Cal. Apr. 29, 1991) (dismissing mistake and unjust enrichment claims by the government for lack of jurisdiction, despite parallel FCA claims); *Hughes Aircraft Co.*, 1991 WL 133569, at *1 (same).

Multiple decisions of the Boards of Contract Appeals make clear that CDA jurisdiction over contract claims is not "los[t]" where the government files a follow-on FCA action so long as no determination of fraud is required to resolve the breach of contract claim. *See, e.g.*, *Appeals of Hardrives, Inc.*, IBCA No. 2511, 91-2 B.C.A. (CCH) ¶ 23769 (Feb. 6, 1991) ("If Congress had intended to make the major point that Boards would 'lose' jurisdiction over a contractor's CDA appeals once the Government asserted its own fraud charges in connection with the contractor's claims, it simply could have said so in the statute."); *id.* (the "only . . . limitation on a Board's authority is that it cannot make a final determination as to whether fraud exists.").

For example, in *Appeal of TDC Management Corp.*, DOTCAB No. 1802, 90-1 BCA (CCH) ¶ 22627 (Oct. 25, 1989), the government filed a civil FCA action nearly three years after the contractor commenced Board litigation

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seeking payment under a contract. The Department of Transportation Contract Appeals Board observed that it is not "divested of jurisdiction whenever fraud is raised," and drew a distinction between the "finding the facts which indicate that a fraud has or may have been perpetrated, as a necessary part of evaluating evidence . . . which the Board has jurisdiction to render," and "a formal determination that as a matter of law a fraud was perpetrated." *Id.* As a result, the Board held that it retained jurisdiction over the breach of contract claim, notwithstanding the parallel FCA action pending in district court. *See also, e.g.*, *In Re Appeal of Medica, S.A.,* ENGBCA No. PCC-142, 00-2 B.C.A. (CCH) ¶ 30966 (Jan. 11, 2000) ("[w]hether fraud or other illicit acts were committed in the course of the events underlying the Government's claims are separate matters to be resolved elsewhere"); *Appeal of M & M Servs., Inc.*, ASBCA No. 28712, 84-2 B.C.A. (CCH) ¶ 17405 (Apr. 19, 1984) (observing that "[a] claim will not be dismissed or suspended merely on the basis of an allegation by the Government of fraudulent conduct by the contractor" because "the issue of the rights of the parties under the contract and the determination of whether fraud exists are two separate matters to be decided by different tribunals"); *see also Appeal of – Range Tech. Corp.*, ASBCA No. 51943, 9302 B.C.A. (CCH) ¶ 32290 (June 23, 2003) (same).

The two specialized contract appeals boards and their predecessors have repeatedly confirmed that "[t]he legislative history makes clear that Congress *particularly* intended the Boards to have jurisdiction over breach of contract

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claims." *TDC Management Corp.*, DOTCAB No. 1802, 90-1 BCA (CCH) ¶ 22627 (emphasis added). And here, a CBCA action is already pending concerning whether MSA breached the terms of the Mission Support Contract by charging unallowable affiliate fee. *Mission Support Alliance, LLC v. Department of Energy*, CBCA 5095. The CBCA action has been stayed "to avoid duplicative discovery and allow for the efficient resolution of both proceedings." Ex. B (parties' joint status report requesting extended stay); Ex. A (order granting stay). Notably, Judge Somers did not dismiss the CBCA action once the government filed its False Claims Act Complaint. Nor did the Department of Justice ask it to. The case instead has been stayed pending resolution of the False Claims Act action over which the CBCA has no subject matter jurisdiction.

This approach is consistent with the CDA's purpose and intent—to "establish[] a comprehensive scheme of administrative and legal remedies in specialized courts designed to facilitate administrative resolution of contract claims." *Marovic*, 69 F. Supp. 2d at 1194. This purpose "will be frustrated if the fraud exception is read so broadly as to encompass any claim by a contractor that is related to fraud, regardless of how remotely connected the fraud is to the claim." *Id.*; *see also United States v. Renda Marine, Inc.*, 667 F.3d 651, 655 (5th Cir. 2012) (same).

While some district court decisions contain language reflecting a broader view, *see Marovic*, 69 F. Supp. 2d at 1193, the Federal Circuit (which hears all

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appeals from the Boards) has unambiguously held that claims "which are clearly not inextricably linked with liability for fraud, must first be the 'subject of a decision by the contracting officer,'" *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985) (quoting 41 U.S.C. § 7103(a)). The district court decisions that take a broader view of the CDA's fraud exception turn on the conclusion that the common law claims accompanying the government's FCA claims are "merely *alternative pleadings* of a fraud claim," which is not the case here. *United States v. United Techs. Corp.*, No. C-3-99-093, 2000 WL 988238, at *2 (S.D. Ohio Mar. 20, 2000) (emphasis added); *see also United States ex rel. Costa v. Baker & Taylor, Inc.*, No. C-95-1825, 1998 WL 230979, at *14 (N.D. Cal. Mar. 20, 1998) (same). They also inappropriately point to concerns about judicial economy in a statutory setting where Congress expressly determined that claims *should* be segregated into "different tribunals." *See Appeal of M & M Servs., Inc.*, ASBCA No. 28712, 84-2 B.C.A. (CCH) ¶ 17405; *Appeal of TDC Mgmt. Corp.*, DOTCAB No. 1802, 90-1 BCA ¶ 22627 ("other parts of the claim not associated with possible fraud or misrepresentation of fact will continue on in the agency board or in the Court of Claims where the claim originated" (quoting S. Rep. No. 1118, at 20)). The CDA contemplates that claims will be examined individually, and that the Boards retain jurisdiction where possible. *See Joseph Morton Co.*, 757 F.2d at 1281 (noting that application of the CDA's exclusive grant of jurisdiction is determined claim by claim, and that "Congress did not intend the word 'claim' [as used in 41 U.S.C.

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§ 7103(c)(2)'s fraud exception] to mean the whole case between the contractor and the Government; but, rather, that 'claim' mean each claim under the CDA for money that is one part of a divisible case").

Under the foregoing principles, Count IV of the Complaint must be dismissed. The government's breach of contract claim does not require the CBCA to assess whether MSA engaged in fraud—only whether MSA breached the MSC by allowing LMSI to earn profit. *See* Compl. ¶ 148. That is why the case is in the CBCA to begin with. No act alleged to have breached the contract requires a finding of scienter or any other mental state required to demonstrate a prima facie case of fraud. *See id.* Because no fraud determination is necessary, the breach of contract claim is not merely an alternative pleading of fraud; it is a an entirely separate theory of recovery with separate elements of proof. *See Marovic*, 69 F. Supp. 2d at 1194. Thus, the CDA requires the government to adhere to the exclusive statutory procedures in resolving this claim.

The government has already accepted this to be true by rendering a contracting officer's final decision concerning allegedly unallowable affiliate fee pursuant to the CDA—the appeal from which is now pending before the CBCA. The government cannot credibly invoke the CDA to pursue a claim centered on allegedly unallowable affiliate fee under the contract while simultaneously arguing that a breach of contract claim on the same issue is removed from the CDA's exclusive jurisdiction. *See* Ex. B ("The Department of Justice's claims in [its FCA complaint] concern the same contract for information technology

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services at issue in this [CBCA] appeal."); Compl. ¶ 148 (alleging breach of contract for "charging the Department of Energy for unreasonable and unallowable subcontractor fee in violation of contractual and regulatory provisions"). The government is merely attempting to obtain two bites at the apple by pursuing essentially the same claims in two separate fora. Congress by statute has directed such claims be governed by the CDA. The government's breach of contract claim against MSA should follow the jurisdictional route prescribed by Congress.

CONCLUSION

FCA cases always carry the specter of massive threatened exposure, the guarantee of substantial discovery costs, and the diversion of enormous amounts of time and attention. At the motion to dismiss stage, the Court serves a gatekeeping function to ensure that the case, as alleged, would state a valid FCA cause of action, most especially on the elements of scienter and materiality. The Complaint makes clear that DOE knew the key elements on rates and potential for profit when it approved the LMSI subcontract and while it paid for performance under the subcontract for years. The Complaint should be dismissed. At a minimum, the breach of contract claim should be dismissed without prejudice under the CDA.

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Dated this April 23, 2019.

Respectfully submitted,

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED: April 23, 2019 at Seattle, Washington.

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